

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VOLUMECCOMO APPAREL, INC.,)	Case No. 11-4201-SC
)	
Plaintiff,)	ORDER GRANTING GEMADEPT'S
)	<u>MOTION TO DISMISS</u>
v.)	
)	
EXPEDITORS INTERNATIONAL OF)	
WASHINGTON, INC.; EXPEDITORS)	
INTERNATIONAL OCEAN,)	
)	
Defendants.)	
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HANJIN SHIPPING CO., LTD,)	
)	
Third-Party Plaintiff,)	
)	
v.)	
)	
GEMADEPT CORP.,)	
)	
Third-Party Defendant.)	
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EXPEDITORS INTERNATIONAL OF)	
WASHINGTON, INC.,)	
)	
Third-Party Plaintiff,)	
)	
v.)	
)	
GEMADEPT CORP.,)	
)	
Third-Party Defendant.)	
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I. INTRODUCTION

Volumeccocomo Apparel, Inc. ("Volumeccocomo") brings this action against Expeditors International of Washington, Inc. and Expeditors International Ocean (collectively, "Expeditors") for loss of and damage to ocean cargo. ECF No. 1 ("Volumeccocomo Compl.>").

Volumeccocomo's action has triggered a number of third-party actions for indemnity and contribution: (1) Expeditors filed a third-party complaint against Hanjin Shipping Co., Ltd, ("Hanjin"); (2) Hanjin filed a third-party complaint against Gemadept Corporation ("Gemadept"); and (3) Expeditors filed a cross-claim against Gemadept. ECF Nos. 8 ("Expeditors Compl.>"); 21 ("Hanjin Compl.>"); 26 ("Expeditors Crosscl.>"). Gemadept now moves to dismiss Hanjin's third-party complaint and Expeditors' cross-claim for lack of personal jurisdiction.¹ ECF No. 27 ("Mot.>"). The Motion is fully briefed. ECF Nos. 31 ("Hanjin Opp'n"), 32 ("Expeditors Opp'n"), 34 ("Reply>"). Pursuant to the local rules, the Court finds this matter appropriate for decision without oral argument. As detailed below, the Court GRANTS Gemadept's Motion.

II. BACKGROUND

The complaints filed by the various parties do not include many details, but the Court has been able to piece together the following facts. On or about January 22, 2011, Volumeccocomo delivered 4,947 cartons of women's apparel to Expeditors.

Volumeccocomo Compl. ¶ 4. Expeditors agreed to transport the shipment from Phnom Penh, Cambodia to Los Angeles, California

¹ As discussed in Section III, *infra*, Gemadept mistakenly brought this Motion under Federal Rule of Civil Procedure 12(b)(6), which concerns a failure to state a claim.

1 aboard "the barge Gemadept," a/k/a the Gemadept 18, and then the
2 "vessel Hanjin Phoenix." Id. According to Hanjin, Gemadept was
3 responsible for first transporting the shipment from Phnom Penh to
4 Ho Chi Minh City, Vietnam. Hanjin Compl. ¶ 3. Both Volumecocomo
5 and Hanjin allege that the shipment was lost overboard from the
6 Gemadept 18. Volumecocomo Compl. ¶¶ 6-7; Hanjin Compl. ¶ 5.

7 On August 25, 2011, Volumecocomo filed this admiralty action
8 against Expeditors, alleging damages of over \$350,000.
9 Volumecocomo Compl. ¶ 7. Expeditors then sought indemnity and
10 contribution from Hanjin and Hanjin sought indemnity and
11 contribution from Gemadept. Expeditors Compl.; Hanjin Compl.
12 Finally, Expeditors filed a cross-claim against Gemadept, also for
13 indemnity and contribution. Expeditors Crosscl.

14 On March 1, 2012, Gemadept filed a motion to dismiss
15 Expeditors' and Hanjin's claims, arguing that this Court lacks
16 personal jurisdiction. Mot. at 1. In support of the Motion,
17 Gemadept has filed a declaration by Do Van Minh ("Do"), Gemadept's
18 General Director. ECF No. 38 ("Do Decl.") ¶ 2. Do declares that
19 Gemadept is a Vietnamese corporation with its principal place of
20 business in Ho Chi Minh City; that Gemadept does not own or charter
21 any vessels that call at ports in the State of California; that
22 Gemadept has no offices, agents, business records, bank accounts,
23 property, or employees in California; that Gemadept does not
24 advertise in California; that Gemadept is not registered to do
25 business in California; and that Gemadept's contacts with
26 California are otherwise "non-existent." Id. ¶¶ 4, 7-13.

27 In opposition to the Motion, Expeditors and Hanjin have
28 submitted several documents which, they argue, show that Gemadept

1 has consented to jurisdiction in this district. These documents
2 are: (1) the Agreement of Carriage between Hanjin and Gemadept, (2)
3 the Gemadept Bill of Lading, and (3) the Hanjin Bill of Lading.²
4 Shin Decl. Exs. A ("Agr. Of Carriage"), B ("Gemadept B/L"), C
5 ("Hanjin B/L").³

6 Agreement of Carriage: On October 1, 2010, Hanjin and Gemadept
7 entered into an Agreement of Carriage covering sea carriage by
8 Gemadept on Hanjin's behalf between certain Asian ports. Agr. of
9 Carriage. Among other things, the Agreement of Carriage provides:
10 "[Gemadept] shall indemnify and hold [Hanjin] harmless from all
11 expenses and liabilities she may incur which, in any way, may be
12 from or connected with loss, damage, delay or misdelivery of cargo
13 and/or containers while in the possession or custody of
14 [Gemadept]." Id. § 7.01. The Agreement also states:

15 [Gemadept] agrees to subscribe and shall be bound by the
16 terms and conditions of [Hanjin's] through B/L moving
17 under this agreement, except as otherwise in conflict
18 with the provisions of this Agreement. [Gemadept] shall
19 issue internal memorandum B/L fully incorporating the
20 cargo description of each through B/L for shipment moving
under [Hanjin's] through B/L. However, the B/L shall not
prevail if in conflict with provisions herein and the
terms and conditions of the through B/L.

21 Id. § 6.01. In other words, Gemadept agreed to be bound by
22 Hanjin's bills of lading so long as those bills of lading do not
23 conflict with the terms of the Agreement of Carriage. With respect

24 ² The bill of lading ("B/L") "is the basic transportation contract
25 between the shipper-consignor and the carrier; its terms and
26 conditions bind the shipper and all connecting carriers." S. Pac.
Transp. Co. v. Commercial Metals Co., 456 U.S. 336, 342 (1982).

27 ³ Woo-Chol Shin ("Shin"), a claims manager for Hanjin, filed a
28 declaration in support of Hanjin's opposition to the Motion. ECF
No. 31-1 ("Shin Decl.").

1 to jurisdiction, the Agreement of Carriage provides: "The courts
2 of Singapore shall have jurisdiction to settle any dispute which
3 may arise between the parties in respect of the construction[,]
4 validity[,] or performance of this Agreement." Id. § 10.02.

5 Gemadept Bill of Lading: On January 22, 2011, Gemadept issued
6 a bill of lading to Pacific Crown Shipping Ltd., as agent for
7 Hanjin, for the carriage of eleven shipping containers, including
8 the two containers in which Volumecocomo's goods were allegedly
9 shipped from Cambodia to Vietnam aboard the Gemadept 18. Shin
10 Decl. ¶ 6; Gemadept B/L. In its reply brief, Gemadept points to
11 the Terms and Conditions of the Gemadept Bill of Lading, which is
12 attached to the Declaration of Alexander J. Casnocha ("Casnocha"),
13 Gemadept's attorney. ECF No. 40 ("Casnocha Decl.") Ex. A.
14 ("Gemadept B/L Terms & Conditions"). Among other things, the Terms
15 and Conditions provide:

16 (2) Jurisdiction

17 All actions under the contract of Carriage evidenced by
18 this Bill of Lading shall be brought before the economic
19 Court at HoChiMinh [sic] City and no other Court shall
20 have jurisdiction with regard to any such action, unless
the Carrier appeals to another jurisdiction or
voluntarily submits himself thereto.

21 Id. § 27.

22 Hanjin Bill of Lading: Also on January 22, 2011, Hanjin issued
23 a bill of lading to Expeditors for the containers holding
24 Volumecocomo's goods. Shin Decl. ¶ 10; Hanjin B/L. The reverse
25 side of the Hanjin Bill of Lading defines certain terms. "Carrier"
26 means "Hanjin . . . , its vessel, agents and subcontractors at all
27 stages of carriage" Id. § 1(b). "Merchant" means "any
28 actual or previous holder of this Bill of Lading, and shall include

1 shipper, consignor, consignee, owner and receiver of the Goods and
2 their agents." Id. § 1(f). "'Subcontractor' identifies all
3 interests engaged in owning operating or chartering the vessel,"
4 including the "feeder line." Id. § 1(i). The front of the Hanjin
5 Seaway Bill identifies Expeditors as the "shipper" and "consignee";
6 Long Beach, California as "the port of discharge"; Phnom Penh as
7 the "Pier or Place of Receipt"; and Gemadept 18 as the "pre-
8 carriage." Id.

9 The Hanjin Bill of Lading also contains provisions relating to
10 choice of law and the proper jurisdiction for disputes among the
11 parties. Specifically, the back of the Hanjin Bill of Lading
12 provides:

13 Disputes arising under the Bill of Lading shall be
14 determined at the option of the Merchant [i.e.,
15 Expeditors] by the courts and in accordance with the law
16 (including choice of law) at (i) the Carrier's [i.e.,
17 Hanjin's] principal place of business . . . ; or (ii) the
place of receipt of the Goods by the Carrier, or the port
of discharge [i.e., Long Beach, California].

18 Id. § 3(a). While the Hanjin Bill of Lading refers to the Gemadept
19 18, there is no indication that Gemadept ever consented to it.

20 21 **III. LEGAL STANDARD**

22 Gemadept mistakenly moves to dismiss under Federal Rule of
23 Civil Procedure 12(b)(6). The basis of Gemadept's motion is lack
24 of personal jurisdiction, and, thus, the motion should have been
25 brought under Rule 12(b)(2). Despite this mistake, the Court
26 treats Gemadept's motion as one brought under Rule 12(b)(2).
27 Gemadepts' intent was clear from its papers. Further, as both
28 Hanjin and Expeditors have substantively addressed Gemadept's

1 personal jurisdiction arguments, this approach will not unfairly
2 prejudice any of the parties and avoid duplicative briefing.

3 Where a court considers a motion to dismiss for lack of
4 jurisdiction without an evidentiary hearing, "the plaintiff need
5 only demonstrate facts that if true would support jurisdiction over
6 the defendant." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir.
7 1995) (citations omitted). Jurisdiction must comport with both the
8 long-arm statute of the state in which the district court sits and
9 the constitutional requirements of due process. Mattel, Inc., v.
10 Greiner & Hausser GmbH, 354 F.3d 857, 863 (9th Cir. 2003). Under
11 California's long-arm statute, Cal. Code Civ. Proc. § 410.10,
12 courts may exercise jurisdiction to the extent permitted by the Due
13 Process Clause of the Constitution. Panavision v. Toeppen, 141
14 F.3d 1316, 1320 (9th Cir. 1998). The Due Process Clause allows
15 federal courts to exercise jurisdiction where the defendant has had
16 sufficient minimum contacts with the forum such that exercise of
17 jurisdiction is reasonable. Id. Personal jurisdiction can also be
18 established by the defendant's express or implied consent to be
19 sued in the forum state. Chan v. Soc'y Expeditions, 39 F.3d 1398,
20 1406 (9th Cir. 1994).

21 22 **IV. DISCUSSION**

23 Gemadept argues that the Court lacks personal jurisdiction
24 because Gemadept has "absolutely zero contact with California."
25 Mot. at 5. Gemadept points out that it operates out of Vietnam and
26 has no employees, offices, or property in California and that its
27 vessels do not call at ports in California. Id. at 2 (citing Do
28 Decl.). Further, the incident that allegedly gave rise to this

1 action occurred thousands of miles away from California.

2 Expeditors and Hanjin do not dispute these factual
3 contentions, but argue that Gemadept has consented to jurisdiction
4 in California through its Agreement of Carriage with Hanjin and
5 Hanjin's Bill of Lading. Expeditors Opp'n at 4-10, Hanjin at 10-
6 17. In short, Expeditors and Hanjin's theory is this: (1) Under
7 Section 6.01 of the Agreement of Carriage, Gemadept agreed to be
8 bound by the terms and conditions of Hanjin's bills of lading; and
9 (2) Under Section 3(a) of the Hanjin Bill of Lading, the
10 jurisdiction for disputes arising out of the Hanjin Bill of Lading
11 may be determined at the option of the "Merchant," i.e.,
12 Expeditors, and Expeditors has the option of litigating disputes at
13 the port of discharge, i.e., California.

14 As Gemadept points out, Expeditors and Hanjin's analysis
15 overlooks key provisions of the Agreement of Carriage -- the only
16 relevant agreement in this case to which both Hanjin and Gemadept
17 consented. Under the Agreement of Carriage, "[t]he courts of
18 Singapore shall have jurisdiction to settle any dispute[] which may
19 arise between [Hanjin and Gemadept] in respect of the
20 construction[,] validity[,] or performance of this Agreement."
21 Agr. of Carriage § 10.02. This provision directly conflicts with
22 Section 3(a) of the Hanjin Bill of Lading, which would allow for
23 jurisdiction in California. Gemadept agreed to "subscribe to and
24 [] be bound by the terms and conditions of [Hanjin]'s through B/L .
25 . . except as otherwise in conflict with the provisions of [the
26 Agreement of Carriage]." Id. § 6.01. Thus, the Agreement of
27 Carriage's jurisdiction selection clause -- which sets jurisdiction
28 in Singapore -- must prevail over the jurisdiction selection clause

1 in the Hanjin Bill of Lading.⁴ To hold otherwise would bind
2 Gemadept to contractual terms to which it never consented -- terms
3 which conflict with the Agreement of Carriage to which both
4 Gemadept and Hanjin consented.

5 As Gemadept has no contacts with California and has not
6 consented to be sued here, the Court finds that Hanjin and
7 Expeditors' complaints against Gemadept fail for lack of personal
8 jurisdiction.

9
10 **V. CONCLUSION**

11 For the reasons set forth above, the Court GRANTS Gemadept's
12 Motion to Dismiss and DISMISSES Hanjin's Third-Party Complaint (ECF
13 No. 21) and Expeditors' Crossclaim (ECF No. 26) for lack of
14 personal jurisdiction.

15
16 IT IS SO ORDERED.

17
18 Dated: April 9, 2012

19 
20 UNITED STATES DISTRICT JUDGE

21
22 ⁴ Gemadept also argues that the Terms and Conditions of the
23 Gemadept Bill of Lading, which provide that only the Economic Court
24 at Ho Chi Minh City shall have jurisdiction over disputes arising
25 out of the Gemadept Bill of Lading, are dispositive. Reply at 4.
26 The Court disagrees. As an initial matter, Gemadept failed to
27 properly authenticate or establish the foundation for the Terms and
28 Conditions. But even if the evidence were admissible, it would not
be dispositive. Under the Agreement of Carriage, Gemadept's bills
of lading "shall not prevail if in conflict with provisions [of the
Agreement of Carriage] and the terms and conditions of [Hanjin's]
through B/L." Agr. of Carriage § 6.01. Here, the jurisdictional
provisions of the Gemadept Bill of Lading conflict with the
jurisdictional provisions of both the Hanjin Bill of Lading and the
Agreement of Carriage.